UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 3:20-CV-01979-M
	)	
NEORA, LLC; a Texas limited liability company formerly known as Nerium International, LLC; et al.,	)	
	)	
Defendants.	)	
	)	

MOTION FOR SUMMARY JUDGMENT HEARING
BEFORE THE HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT COURT JUDGE
SEPTEMBER 28, 2022
DALLAS, TEXAS

FOR THE PLAINTIFF:

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(PROCEEDINGS BEGAN AT 1:00 PM.)

COURT SECURITY OFFICER: All rise.

The United States District Court for the Northern District of Texas is now in session. The Honorable United States District Judge Barbara M.G. Lynn is presiding.

THE COURT: Be seated, please.

All right. The Court has a number of matters set for this afternoon in connection with *FTC versus Neora*.

Can I have appearances, please, first for the FTC?

MS. ROLLER: Your Honor, Katharine Roller for the Federal Trade Commission.

THE COURT: Okay.

MR. WARD: Your Honor, Guy Ward for the Federal Trade Commission.

THE COURT: All right. And for the Defendants?

MR. FLORENCE: Your Honor, Craig Florence and Michelle Ku on behalf of the Defendants are at the table for the Defendants. I'm also joined by Ed Burbach and Rob Johnson.

Also in the courtroom are representatives of Neora including Amber Rourke who is the Chief Marketing Officer of Neora, Deb Heisz who is the Co-CEO, and Gail Lane who is the general counsel.

THE COURT: Okay. All right, very good.

All right. The Court is assuming that we can conclude the argument by 3:30 at the very latest, so I'm not going to run

past that. So modify your time accordingly.

It seems to me, given what's cued up here, that you all have in mind to start with the summary judgment. I don't care where we start, but there are, obviously, some issues with respect to the some of the declarations and whether they are to be considered by the Court in connection with the summary judgment.

So where do you all want to begin?

MS. ROLLER: Your Honor, if you would like to hear from the Federal Trade Commission first, we would begin with the summary judgment motions, if that is pleasing to the Court.

THE COURT: Okay. Do you all have a suggestion about where we start?

MR. FLORENCE: Your Honor, we're fine with that as well.

THE COURT: Okay. All right, very good.

Okay. I'm -- I'm just telling you all when we're going to be done. So have you all discussed the timing so that you leave time for each side to be arguing?

MR. FLORENCE: We have not, Your Honor.

THE COURT: Okay. Why don't you do that now. I don't want to be the timekeeper. It's distracting for me to have to do it.

MR. FLORENCE: Your Honor, tough negotiations. 50/50.

THE COURT: Okay. All right. There will be -- I mean

we've got more to do than just the summary judgment, so that's my point, and I may have some questions. So how much time do you anticipate for your argument on the summary judgment?

MS. ROLLER: Your Honor, we only have ten minutes of affirmative presentation because we wanted to make sure to leave --

THE COURT: Okay.

MS. ROLLER: -- plenty of time for questioning.

THE COURT: Okay. All right. Then I don't think we'll have any trouble. All right. Thank you.

MS. ROLLER: Okay. May I begin?

THE COURT: Yes.

MS. ROLLER: Thank you, Your Honor.

THE COURT: And if you've been fully vaccinated, you can take your mask off when you're standing at the lectern.

MS. ROLLER: Thank you. I will do that.

THE COURT: I'm not very good at predicting what people look like without their mask on. It's always a big surprise. But I've seen you, I think, before, so I'm not really surprised.

MS. ROLLER: I hope it's not an unpleasant one.

THE COURT: Oh, no, not at all.

MS. ROLLER: Neora is a business rife with dishonesty. Defendants lied to BPs about how much money they would make. They lied about EHT. And the entire structure of their compensation scheme is the embodiment of a lie because it is

impossible for the majority of BPs to achieve any real success.

In the words of the Fifth Circuit speaking en banc in *Torres versus S.G.E. Management*, quote, "Its very structure conceals the fact that those at the bottom of the pyramid will be unable to recoup their investment."

That is what separates a legitimate MLM where participants can succeed by retailing alone from a pyramid scheme like Neora. When the only way to succeed is by recruiting a large downline, then most recruits will be trapped in one of those downlines, someone else's downline, without enough recruits themselves to succeed.

Thus, the vast majority will inevitably lose money as 96 percent of Neora BPs indisputably do. That is why pyramid schemes are illegal, and that is why summary judgment should be granted in the FTC's favor. There is no genuine dispute of material fact about any of the FTC's five counts or about individual and injunctive liability.

On Count One, illegal pyramid scheme, Defendants do not raise a dispute of fact but, instead, ask the Court to invent a new legal test contrary to *Koscot* and utterly unsupported by federal law. Defendants cite no federal case applying their purported "primarily" test, whether based on money in or money out and, indeed, there are none.

Neither do Defendants cite any case requiring proof of a company's inevitable collapse, whatever that would look like.

Instead, courts apply the *Koscot* test, asking whether participants pay money for the right to receive recruitment rewards unrelated to the sale of product to ultimate users. And the word "right" is important there. *Koscot* asks whether participants have a right to receive recruitment awards unrelated to ultimate user sales, not whether participants, in fact, receive such rewards. That is why courts begin their analysis, not with data on rewards paid but with a company's compensation plan which lays out the rewards participants have a right to receive, and the Court should do the same here.

It is undisputed that the vast majority of rewards in Neora's Compensation Plan require recruitment; often massive recruitment. Indeed, Neora's Corporate Representative admitted as much at the company's deposition.

And it is undisputed that the recruitment rewards in Neora's Compensation Plan are vastly more lucrative than the handful of low-paying rewards that can be earned for retail sales alone. And although Defendants claim that rewards paid on BPs' own purchases should be considered ultimate user sales, *Vemma* is very clear that participant purchases are not ultimate user sales where a company trains and incentivizes participants to buy product to be eligible for rewards, thereby poisoning the well.

Defendants do not dispute the FTC's evidence that they do exactly that. Indeed, individual Defendant Olson is at the forefront of this training, personally telling BPs that they

might buy product to be eligible for rewards, training BPs to focus on recruitment rather than sales, and personally telling BPs that they can make six-figure incomes if they just try hard enough. He is also the Founder and CEO of the company. By his own admission, he has, quote, "the final say," end quote at Neora.

To be individually liable for an FTC Act violation, Olson must have either direct participation in the conduct at issue or authority to control it. Here, by his own admission, Mr. Olson has both. There is, thus, no disputed fact as to his individual liability.

There is also no dispute of material fact about Count Two, Defendants' deceptive earnings claims. An FTC Act deception claim has three elements.

First, was the representation made?

Second, was it false or unsubstantiated?

And third, was it material, which is to say important to consumers' decisions.

Working backward, Defendants have implicitly conceded the third element, that their claims of substantial income were material to consumers by failing to argue that the claims are not important to consumers deciding whether to join their business. That is appropriate since the case law and common sense incontestably establishes that income claims are material to a consumer's decision as to whether to pursue or stay with a

business opportunity.

Defendants have also implicitly conceded the second element, that their claims of lavish lifestyles and substantial incomes are false. They do not dispute that most BPs pay more money into the scheme than they get out. Indeed, Neora's own data establishes that fact.

As to the first element, whether Defendants, in fact, represent that BPs will likely make substantial income, Defendants assert that they did not make such representations, but they do not challenge the vast majority of the FTC's hundreds of examples of their misleading income claims. Indeed, by Defendants own count, the FTC's brief cites 204 examples of misleading income claims by Defendants of which they challenge only 19. Mere *ipse dixit* is not enough to overcome the overwhelming weight of the FTC's evidence.

With regard to Counts Three and Four, the deceptive efficacy and establishment claims regarding Defendants' EHT product, the story is the same. Defendants do not challenge the vast majority of the FTC's examples of their deceptive claims that EHT can cure, treat or prevent Alzheimer's, Parkinson's, concussions and CTE. There is, thus, no genuine dispute of fact as to whether those representations were made.

As to the second element, substantiation, Defendants do not, in fact, argue that they can substantiate the claims about Alzheimer's, Parkinson's, CTE or concussions. Instead, they

claim to have the scientific evidence to support other claims not at issue in this lawsuit. They are irrelevant to the question before the Court.

And with regard to the third element, materiality, again, Defendants present no argument on it and, thus, concede that it is met.

Thus, there is no genuine dispute of material fact with regards to Counts One through Four. And because Defendants do not dispute that they placed those deceptive representations in the hands of BPs who could use them to mislead, instead invoking an irrelevant assisting and facilitating standard from a totally separate line of cases and disputing that, summary judgment is also appropriate on Count Five, means and instrumentalities.

Finally, injunctive relief is indisputably proper and necessary to prevent Defendants from continuing to run their illegal pyramid scheme and lie about BP income and EHT. Those violations are ongoing. Neora is a pyramid scheme today, and the FTC's largely unchallenged exhibits show numerous examples of deceptive income and EHT claims made during the pendency of this litigation. And even if Defendants' conduct were not ongoing, the *Cornerstone Wealth* factors, which Defendants do not dispute, show that that conduct is likely to recur and, therefore, an injunction should issue.

The FTC, therefore, respectfully requests that the Court enter the proposed order attached to its Motion for Summary

Judgment. The provisions of that order are well accepted in FTC cases going back decades and appropriate for a company that has demonstrated it cannot be trusted to run a legitimate MLM.

Defendants raise no specific objection to any provision of the FTC's proposed order. They have, thus, waived any objection to entry of the order if the Court rules in the FTC's favor on liability on any count.

If the Court has any questions about the FTC's requested relief or any other issue in the case, it would be our pleasure to answer them.

My colleague, Mr. Ward, will be glad to answer any questions the Court may have about Counts Three and Four or about Dr. Mindy Kurzer. I will be happy to address any other questions the Court may have.

THE COURT: Okay. All right. Thank you.

Go ahead.

MR. FLORENCE: Your Honor, we previously provided the Court with a PowerPoint presentation. Do you have a copy of that?

THE COURT: Yes.

MR. FLORENCE: I hope that the PowerPoint presentation will facilitate our discussion because there's a lot to unpack in the context of the claims being made in this lawsuit and the nuance associated with that. And so I would like to start with the pyramid claim allegations that are made. And on this one,

Your Honor, there are cross motions for summary judgment as relates to that point.

And the starting point of any discussion of a pyramid scheme is, of course, the *Koscot* case cited by numerous courts and by both parties in their briefs. And it's worth thinking about the *Koscot* test and particularly the second prong which I've highlighted on the fourth page of our PowerPoint here and in terms of understanding what were the facts that led the FTC Administrative Judge in that case to pronounce this test.

In that particular case, this was a late '60s, early '70s case and at that particular time, the company, the defendant in that matter, had a situation where it paid -- where it charged distributors $5000 to join the company. Of that $5000, half was paid to the upline sponsoring distributor and half was paid to the company.

So when we look at the second prong of the *Koscot* test, that's the factual predicate that was before the Court at that time. In fact, they refer to those payments for distributorship as "headhunter fees." As we get in, we'll show there are subsequent cases that this test has evolved and that the circumstances in *Koscot* bear no relationship to what's happening at Neora today.

The second major administrative action which informs, we believe, the pyramid scheme is the *Amway* decision. And whereas *Koscot* was found to be a pyramid scheme, *Amway* was not.

And so there are initial decision findings followed by the Commission, and I'll talk about both of those, Your Honor. And I've pulled out a few of the initial findings that were made by the AL Judge because I believe they inform our look at what happens at Neora.

The first one is it talks about the manner in which Amway sells its products. What it would do is it would sell products to a distributor who would then sell those products either to a consumer or to a sponsoring distributor that they signed up. That created a threat of what's sometimes called "inventory loading" or "garage qualifying" because what it meant was that distributors were holding a lot of product, and that creates potential problems for those people if they can't sell it.

Neora, on the other hand, has a much superior system. Neora drop-ships its products directly to the customers. Therefore, its Brand Partners, who are the distributors in the Neora system, are simply not in the situation where they have to both purchase or hold large amounts of inventory.

It also creates something of a unique circumstance compared to a lot of the cases that are cited by the parties. Because there is a drop-shipping methodology for delivering that product, Neora has data regarding who it sells to that dates back to its founding in 2011.

Finding 36, Amway charged a fee of $26.25 for its Sales

Kits when you started as a distributor. Neora charges $20. It covers the cost and it is not included in any commission calculation. So that if a Brand Partner goes and signs up a new Brand Partner, the mere act of recruiting that person means there's no compensation paid to the sponsoring distributor in that circumstance.

Finding 53 talks about the fact that all of the compensation paid in Amway required a sale to be made at some point in the chain. And, in fact, it talked about the payments to upline as corresponding to the compensation that would be paid by manufacturers to wholesale.

The idea there is if you build a sales team, that's a valuable part of the distribution channel in a direct selling marketing company. And multi-level marketing allows you to recognize the work that's invested by the persons who are building that team. Building that team helps the -- helps the company because it allows the reach of those persons to consumers to be greater and, therefore, allows for greater sales.

Finding 57 in the *Amway* decision identified the fact that 25 percent of the Amway distributors sponsored new distributors. Interestingly enough, according to the Defendants' expert, Dr. Bosley, they calculated that 26 percent of Neora Brand Partners between 2012 and 2020 sponsored new distributors.

That's important because what that's going to -- what that shows us is that not everyone who joins a multi-level

marketing company, like Neora, does so because they want to create an upline or create a business. There are a variety of reasons, and I'll address that in more detail as we get further in.

Turning to the next page, Your Honor, Amway had a role that required distributors to sell at least 70 percent of the products so as to avoid inventory loading.

They noted in Finding 106 that successful direct reselling companies have quality products, money-back guarantees, and the ability to train and motivate a sales force.

Amway also talked about the relatively -- relative high turnover which is something that the FTC criticizes us in their brief. And Amway noted in that particular matter that recruiting is essential in a multi-level marketing company. It is not a sin to recruit. It is a part of that sales channel.

And it's easy to understand why there is turnover. The barrier for entry, a $20 fee, is very low. It's not everyone's cup of tea. People decide they want to do it for a period. They drop out. There can be any number of reasons why there can be turnover but which would be unrelated to whether it's a pyramid scheme.

Your Honor, turning next to Page 7, I've asserted here some of the policies and procedures that have been put in place by Neora, and you'll see, as we go through those, turning to Page 8, that a number of them echo exactly the things that were found

to be approved by Amway in connection with its -- its being found not to be a pyramid scheme.

Section 9.01 points out the fact that at Neora there are no purchase requirements for Brand Partners. In fact, one of the reasons you might join -- might want to be a Brand Partner but not build an upline is the fact that you get an additional ten percent break on your product.

Turning next to Page 9, there's a prohibition on stockpiling, one of the hallmarks or problematic aspects of some pyramid schemes. In fact, the fact that Neora drop-ships severely limits the risks associated with that.

Page 10, you'll see there's a 70 Percent Rule for Neora's policy and procedure just like we saw in *Amway*.

Page 11, Retail Sales Rule. In order to be active -- and by "active" in this context, we're talking about the right to seek commissions and rewards -- you have to make sales. And that's, of course, important in determining whether or not, as the FTC says, Neora is an entity that overemphasizes recruiting at the expense of sales.

Turning next to Page 12, there's prohibitions on selling products outside the channel, such as Amazon.

Turning to Page 13, there's a provision here that allows a Brand Partner to be -- to return product, just as we saw in Amway. The Court there, the Administrative Judge, emphasized the importance of being able to return product. Neora allows to

you return product for 90 percent of the cost you paid if you terminate your Brand Partnership.

All of this leads back to what the ultimate opinion of the Commission was in the *Amway*. And on Page 14, we have a quote which we think is very important in terms of framing what the true issues are in this case.

In there it says, "A sponsoring distributor receives nothing from the mere act of sponsoring. It is only when the newly-recruited distributor begins to make wholesale purchases from his sponsor and sales to consumers that the sponsor begins to earn money from his recruit's efforts."

In other words, if you are an upline Brand Partner, you only make money in Amway when there is a sale made by someone who is downline from you. That was held not to be a pyramid scheme, and Neora is the same way.

In this case, we're going to show you some of the positions being taken in this case to show you that, in fact, what's occurring here is that the FTC wants to reverse what the ruling was in *Amway* and not allow any commissions to be paid upline unless that person made the actual sale themselves.

Turning next to Page 15, Your Honor, this is a quote out of a District Court out of Utah that recognized the *Amway* decision. "A structure that allows commissions on downline purchases by other distributors does not, by itself, render a multi-level marketing scheme an illegal pyramid."

And then the Court goes on to note that if that were, in fact, the rule, Amway would have been a pyramid scheme. There are other courts -- And it cites *Amway*. There are other courts, Your Honor, that are in accord. We cited these in our brief, including *U.S. versus Gold* and the *Omnitrition* case out of the Ninth Circuit.

Your Honor, the next page on Page 16 is testimony from David Givens. He is the FTC staff economist, and he was asked questions to the effect of: Are there any sales that are made in the Neora compensation system -- Let me rephrase that. I misspoke there, Your Honor.

He was asked questions to the effect of: Are there any commissions paid unless a sale is made at somewhere in the line? And he agreed that that was, in fact, the way it's worked.

That's contrary, Your Honor, to what was at issue in the *Koscot* case where the *Koscot* case was focusing on what they called the "headhunter fees." The idea that just merely signing up a distributor, you get paid for that.

When you have that type of environment, Your Honor, you have a system that truly is a pyramid scheme, and *Koscot* talked about that. In other cases, *Amway* and others have talked about that, too, because it's not a sustainable model. If all the revenue of a company is tied to the fact that you're just signing up people for the right to be distributors, that's not sustainable. It's like a chain letter is what the courts

referred to it as because it's -- eventually you're going to run out of people to recruit.

On the other hand, if you have an organization that is structured in a fashion that emphasizes sales, then you're just like any other retail company. You can sustain yourself so long as there is a market for the products that you want to sell.

In this case, Your Honor, and I've taken a couple of quotes but there's a lot of quotes because I think it helps to frame how what the FTC is claiming in this case as it relates to pyramid schemes is different than what's happening in the *Amway* and *Koscot* cases.

First, I'm quoting from their Motion for Partial Summary Judgment: "Although Neora may point to those rewards in the Compensation Plan that require both recruiting and sales, those rewards are still unrelated to the sale of product to ultimate users under the law."

They're referring to the second prong of *Koscot* there. And they're saying that if you pay any compensation to someone upline, that is automatically an improper recruiting payment.

Your Honor, that's essentially -- they're essentially saying by assuming only legitimate compensation is paid to the person who makes the sale, that if you compensate someone upline, that that is overemphasizing recruiting and that makes you a pyramid scheme. That's contrary to *Koscot*. That's contrary to Amway, and we believe it's contrary to the law which we will

develop further in this presentation.

But it's also important because that finding, that -- that approach, if this Court were to induce -- to endorse that, would mean that no multi-level marketing company could exist because all multi -- the nature of a multi-level marketing company is that you compensate the person who makes the sale as well as the sponsoring distributor who recruits, trains, motivates and -- and promotes the team, just as it was in *Amway*. It's a critical change and one that we believe would mean the end of multi-level marketing. Companies like Tupperware, Mary Kay, even Amway itself would not survive under that analysis.

Here's another quote that we have from their Motion for Partial Summary Judgment: "A reward paid for all or ultimate user sales is a reward based solely upon new participant purchases and for which no recruiting is necessary."

Your Honor, this next page is an FTC Advisory Opinion that was issued in 2004. This would have been in place at the time Neora was found. Actually it was Nerium at that -- at that point. And this Staff Advisory point addresses a couple issues that we believe are critical in terms of analyzing whether Neora is a pyramid scheme.

The first quote that we pulled out talks about, "The amount of internal consumption in any multi-level compensation business does not determine whether or not the FTC will consider the plan a pyramid scheme." "Internal consumption" in this

context refers to Brand Partners who may purchase product for their own consumption. And what this Advisory Opinion from the FTC is saying: That's okay.

In fact, we pointed out earlier that 26 percent, only 26 percent of the Brand Partners of Neora actually go and recruit another Brand Partner. That means there's 74 percent of the Brand Partners who are Brand Partners for a different reason. And we have a substantial amount of evidence, and I'll highlight some of that later, that explains why they do that. And so to the extent that a Brand Partner consumes product and buys product, that doesn't mean it's a pyramid scheme.

The next quote turns to what we believe is the law.

THE COURT: Mr. Florence, let me interrupt you. This isn't terribly germane to your argument, but I thought I heard you say something that I didn't understand.

I thought the FTC's Motion for Summary Judgment was on all claims.

MR. FLORENCE: It is on all claims, Your Honor.

THE COURT: Okay. I think you said "partial summary judgment."

MR. FLORENCE: I misspoke on that.

THE COURT: Okay. Okay.

MR. FLORENCE: They have -- You know what, that was our motion that was partial.

THE COURT: Okay.

MR. FLORENCE: We only moved on the pyramid scheme.

THE COURT: Yes, I know you did. I just wanted to make sure.

MR. FLORENCE: Thank you, Your Honor.

THE COURT: I may have misheard you, what you were saying. Okay. Pick up where you were.

MR. FLORENCE: Picking back up with the Advisory Opinion, the 2004, here we see the FTC is focusing, just like we would have -- did -- would have seen in *Koscot* and Amway, that the critical question on a pyramid scheme is, quote, "whether the revenues that primarily support the commissions paid to all participants are generated from purchases of goods."

And that's what we were talking about earlier. If you're a company whose revenues are primarily attributable to sales, you're a company that can sustain itself.

If, on the other hand, you're a company who makes revenues from selling your distributorships, just like *Koscot* did, where all you get for buying the distributorship is the opportunity to participate, if that's the source of your revenue, then you are a pyramid scheme and you will fail.

So here we see the FTC focusing on the source of revenues. We'll show you our evidence on that in -- in a few slides from now.

The next one, there's, yet, another quote from the Advisory Opinion, again noting that if it primarily depends on

continual recruitment of Brand Partner, then that is a pyramid scheme. If it's primarily made for payments to participate, then that is not sustainable.

And finally, another quote that says the same thing. Absent sufficient sales of goods, then you're hinging on nothing more than recruitment. Exactly what *Koscot* was concerned about, but also what Amway was able to distinguish because it was able to show that it's a company that focused on sales.

Your Honor, the idea -- We disagree with the FTC when they contend that there is no -- there are no other courts that have endorsed this "primarily" provision, and we would cite in that regard proposed conclusions of law in the *BurnLounge* case. And I'm quoting here from the conclusions of law in the District Court action there. And you see there that there, again, it's referencing *Koscot* and that the inquiry is whether sales to ultimate users are the primary basis for funding the rewards; the same thing that was said in the Advisory Opinion.

The next proposal shows that the source of that position can be traced to the expert that was sponsored by the FTC in the *BurnLounge* case. Dr. Vander Nat has been -- was an expert in many cases on behalf of the FTC in their pyramid scheme cases. He was an FTC economist, and he's the one who provided the testimony that was relied upon by the Court to the effect that you have to look at what is the primary source of revenue. The Court, in fact, accepted Dr. Vander Nat's testimony that that

primary basis of where the revenues come from is the basis upon which to determine if it's a pyramid or not. And, in fact, the Ninth Circuit opinion on appeal also referred to the "primarily" test which is the source of that evidence, and advocacy was the FTC's own expert.

Your Honor, moving forward, there's also been FTC Business Guidance.

THE COURT: Mr. Florence, can you hold your thought for one moment? I got to respond to something here. It will take me 15 seconds.

(Pause)

THE COURT: Have a swig of water for a minute.

MR. FLORENCE: Thank you, Your Honor. I have a tendency to get on a roll and need to hydrate.

THE COURT: Okay. I'm going to have to step into my office for just a moment.

MR. FLORENCE: Thank you, Your Honor.

THE COURT: It will be two minutes.

COURT SECURITY OFFICER: All rise.

(Court recessed from 1:44 PM until 1:48 PM.)

COURT SECURITY OFFICER: All rise.

THE COURT: My apologies. Go ahead.

MR. FLORENCE: Thank you, Your Honor.

Your Honor, during the FTC's presentation, one of the things that they said, and its repeated throughout their briefs,

is that an overwhelming percentage of Neora's Brand Partners fail economically by being a part of the process.

When they make that calculation, what they do is they assume that all purchases for product made by Brand Partners is an expense. And, of course, that's why I previously cited the 2004 Business Guidance saying that internal consumption does not make you a pyramid scheme. I now have in front of you the 2018 Business Guidance which confirms that. And, in fact, our expert, Dr. Vandaele, has done a number of calculations that relate to this subject.

One of the things that he calculated was that over the years, between 20 and 30 percent of the persons who become Brand Partners with Neora were formerly what are referred to as "Preferred Customers." And a Preferred Customer is a person who buys Neora products but does not participate in the business opportunity. The only purposes to being a Preferred Customer is to buy product, and a Preferred Customer gets a 25 percent discount. A Brand Partner gets a 35 percent discount.

And so what Dr. Vandaele did was he calculated what percentage of the former Preferred Customers become Brand Partners because it highlights for us that just because you're a Brand Partner and you consume product doesn't mean you're not consuming it for your own use.

According to the FTC, the day before when you are a Preferred Customer, you are buying product because you consumed

it. And then the day after you became a Brand Partner, presumably because you got an additional discount, then it constitutes an expense. That's between 20 and 30 percent of the Brand Partners of Neora fit into that category, and it highlights the impropriety of the assumption that all product bought by a Brand Partner isn't -- should be considered an expense.

In fact, the calculations by Dr. Vandaele, which are all undisputed, Your Honor, show that by 2019 and 2020, over 50 percent of the Brand Partners in Neora only buy product. That's the only -- They don't participate trying to build a downline or anything. And so we think the evidence that's being put forward in terms of economic failure by Brand Partners is significantly flawed and unreliable for that reason.

The next page ---

THE COURT: Let me interrupt you for a moment. I thought you told me at the beginning of your presentation that to be an active Brand Partner, you had to make sales.

MR. FLORENCE: I'm sorry, Your Honor?

THE COURT: You had to make sales of product.

MR. FLORENCE: You have to make sales of product in order to earn commissions.

THE COURT: Okay.

MR. FLORENCE: You do not have to make sales of product to get the discount.

THE COURT: So you're saying that a Preferred Customer

who, as I understand it, is sort of on automatic delivery, --

MR. FLORENCE: Correct.

THE COURT: -- that recognizing the difference between 25 percent and 35 percent, they may switch to become a Brand Partner. But apart from that renaming, they're not changing the mechanics of what they're doing.

MR. FLORENCE: Their consumption behavior is not changing.

THE COURT: Okay.

MR. FLORENCE: The reason they would switch is because they get an additional discount for being a Brand Partner.

THE COURT: And what do they -- what do they expend for getting that additional?

MR. FLORENCE: They don't ---

THE COURT: "Expend" is a poor choice of words.

MR. FLORENCE: Oh.

THE COURT: What additional obligation do they assume to become a Brand Partner?

MR. FLORENCE: The only additional obligation is the one time fee of $20.

THE COURT: Okay.

MR. FLORENCE: That's it.

THE COURT: The Sales Kit.

MR. FLORENCE: The Sales Kit. And so if you consume two months of Neora night cream, which is the No. 1 product that

Neora sells, you very quickly make that up.

THE COURT: Okay.

MR. FLORENCE: Your Honor, Page 25 is additional argument or additional guidance from the FTC in which they're again repeating the guidance that was put in place in 2004 that internal consumption is not problematic.

Your Honor, all of that is background, and I want to shift now to what I think is probably the most important in terms of this Court, and that is the Fifth Circuit authority that has dealt with pyramid schemes. And I want to talk about the *Torres* case that was mentioned by FTC counsel and which is mentioned throughout our briefing.

Your Honor, we refer to it as *Torres I* and *Torres II*. Both of them are Fifth Circuit opinions. *Torres I* was the original opinion that was reversed by the en banc ruling of the Fifth Circuit. We call that *Torres II*, and it was reversed in the context of whether or not class certification was proper.

THE COURT: Okay. But my understanding of the rules of the Fifth Circuit is en banc -- If I'm mistaken, remind me, because I sit as a visiting judge in the Ninth Circuit. But my recollection is that the rule in the Fifth Circuit is that if en banc is granted, that that original opinion is of no effect.

MR. FLORENCE: Your Honor, I would not -- My understanding was slightly different, but I don't want to subject my understanding is superior to yours.

THE COURT: Okay. All right. We'll find out.

MR. FLORENCE: It was my understanding ---

THE COURT: We'll find out. That's my recollection but I may be mistaken.

MR. FLORENCE: I may be mistaken it on that as well and I don't want to overstate. It was reversed on other grounds.

THE COURT: Okay.

MR. FLORENCE: And -- And so that's why we think it's worth looking at *Torres I* but we'll also talk about *Torres II*.

THE COURT: Okay.

MR. FLORENCE: Both of them, in any event, we believe, inform this Court in terms of how to treat pyramid schemes.

Now that was a class action, not an FTC action. It involved a RICO claim, and the question in that case was in connection with the Stream company, Your Honor. There were quite a few articles in the *Dallas Morning News* back in the day about Stream that used a multi-level marketing company structure to go out and sell electricity for your house. And so the question was whether or not Stream was a multi-level -- excuse me -- whether it was a pyramid scheme. And that's what *Torres I* and *Torres II* addressed to some degree, and I'll cover that now.

In *Torres I*, the original panel ruling, Your Honor, was that pyramid schemes will collapse because such schemes are designed to produce income from the continuous recruitment of new members and not upon sales revenues from a legitimate product to

consumers in a normal market.

That's exactly what *Koscot* and *Amway* and *BurnLounge* were all dealing with. Are you an organization that focuses and sustains itself through true sales, like any business, or are you in the business of selling distributorships, which is not a sustainable enterprise.

The next quote that we have is that in the application of -- Actually it's -- it's the proposed -- The ruling on *Torres I* was that in determining whether a business is a pyramid scheme, the focus is whether exclusively or almost exclusively on recruiting as opposed to sales.

That's a dramatic extension of the "primarily" rule that we cited in both the FTC Guidance and in the *BurnLounge* District Court and in the *BurnLounge* Circuit Court decision as well.

Your Honor, I'll turn next to *Torres II*. As I mentioned, it was reversed on other grounds, and the reason it was reversed on other grounds is because for class certification purposes, the en banc court determined that to look at whether there are individual facts or not, you have to look at the way in which a company is structured. And the en banc court, as distinguished from *Torres I*, ruled that, in fact, it's the structure itself. And if you look at the structure, you can determine whether it's a pyramid scheme.

And so, again, *Torres II* looks at it from the point of

view of whether or not the structure focuses on recruitment of people, not products, and that if you have a focus on recruitment on people, quote, "it inevitably causes the scheme to collapse when participants run out of individuals to recruit."

And that's, again, the notion that we see in *Koscot*; that there is not -- there are not an unlimited number of people that you can recruit to be distributors. That's a chain letter, and it's distinguishing that type of structure from a structure which focuses on sales.

Torres II goes on to say that "Those who lose money by reason of the fraud," referring to the pyramid scheme structure, "because the fraud is necessary to temporarily sustain the scheme." What this is talking about there is that when you sell distributorships for $5000 to a new person, well, that's a one-time payment. And not only are you going to run out of people that you can sell that distributor to but that's only a one-time payment and ultimately you're not going to be able to sustain the company, and that's what that quote is talking about.

Your Honor, I next want to turn to some of the evidence that we believe is the basis upon which we're asking for summary judgment on the pyramid scheme.

And the first chart that we prepared was undisputed, uncontroverted evidence regarding how Neora actually operates. And, Your Honor, you'll recall that I mentioned that the fact that Neora has drop-shipping, well, that allows it to maintain

records over the years so that we can see who we're selling to and how much we're selling, too. That's different than a lot of the companies that are -- have been sued in other actions.

This particular chart takes a look at who buys Neora products. Preferred Customers who are indisputably ultimate users, retail customers. Then there's a category called "Retail Customers." Those are also customers who buy the product only to consume it but they don't get an automatic order. And you can see that it's a very, very small percentage of Retail Customers that buy product. And then you can see the number of persons who are Brand Partners.

THE COURT: I'm a little bit color blind. Are these two different colors of blue?

MR. FLORENCE: Your Honor, I'm a lot color blind. So let me -- let me make it ---

THE COURT: Are these two different colors of blue?

MR. FLORENCE: I believe so, Your Honor.

THE COURT: Okay. That -- You should take judicial notice of how unbelievably old the judge is.

MR. FLORENCE: Your Honor, no one is more sympathetic to color blind than I am, and so let me give a ---

THE COURT: I'm going to go off the record for a minute. I'm just going to tell you a funny story I can't resist.

(An off-the-record discussion was held between the Court and counsel.)

THE COURT: So your littler lines are royal blue and the others are something else.

MR. FLORENCE: I wouldn't venture a guess as to the actual colors, but I can tell you that the bar chart showing the highest number of persons correlates with Preferred Customers who buy product.

THE COURT: Okay. Okay.

MR. FLORENCE: The smallest one in the middle, yellow, gold, something like that, --

THE COURT: Retail Customers.

MR. FLORENCE: -- are retail customers. And then the other one, the one on the right which appears to be blue to me, that's Brand Partners. And so what you can see, and you see the percentages across the top, is that between 79 and almost 84 percent of the people who buy Neora products are Preferred Customers. Retail customers are people who don't participate in the Neora business opportunity.

Your Honor, the next chart, again, breaks down Neora sales but this time it looks at it from revenue. When we say: Is Neora sustainable, does it meet the "primarily" test or is it sustainable from a pyramid scheme analysis, this is the undisputed evidence. The one that's -- We have the percentages there which are in the seventies, almost to eighty percent. It shows that almost eighty percent by 2021 of the dollar amount associated with purchases of product from Neora are tied to

Preferred Customers and that the dollar amounts associated with purchases by Brand Partners is a much, much smaller percentage of the -- of the equation.

This is why we believe this is a company that's been in business since 2011; has proven over the test of time that it is not ultimately doomed to collapse; that it is not structured in a fashion that it's going to fail; that it does not rely on recruiting fees; that it does not sustain itself by the $20 payments made by new Brand Partners.

The next chart speaks to that issue as well. And this is a -- This chart breaks it down from the perspective of what are the sources of revenue. And the overwhelming percent ranging between 95 and 98 percent come from product sales.

The other two categories that are much, much smaller relate to Enrollment Packs. If you're a Brand Partner who signs up initially, you can, for a steep discount, buy an Enrollment Pack, and that's a small percentage of the sales, but that's a one-time sale. What you see in this is that by 2021, almost 98 percent of the revenue that's received by the company is associated by sales of product.

And, of course, the third category, it just captures miscellaneous revenue sources; very, very small; two or three percent in the most recent years.

Your Honor, not only are we able to rely on the calculations being done by our own expert, which are -- none of

which are disputed, Your Honor, but if you go to Page 33, we also cite some of the calculations that were prepared by the FTC staff economist, Mr. Givens -- excuse me -- Dr. Givens in the course of his work.

And in this particular chart, they calculated who do the Brand Partners enroll? And here we're talking about: Do they enroll Preferred Customers? Do they enroll Retail Customers? Or do they enroll Brand Partners?

If we're going to say that Neora overemphasizes recruiting of Brand Partners, this charts shows you what actually happens which is an overwhelming percentage of the new parties who are brought to the table are Preferred Customers. And that's the -- the biggest part of the bar chart, and you see the associated numbers that are superimposed on top -- on top of that.

We believe that it is the manner in which a company actually operates that demonstrates whether or not it's a pyramid scheme. The FTC cites a number of different factors, including the income misrepresentations. We acknowledge that the FTC has the right to sue us for income misrepresentation, and I'll turn to that in just a second.

But at least as it relates to pyramid scheme, *Torres* makes clear that it is the manner in which it is structured that determines whether it's a pyramid scheme and whether it will collapse or not and that misrepresentations are not considered in

that context.

Your Honor, we also have -- The next chart addresses whether a Brand Partner who makes the sale makes more money selling to a Preferred Customer versus selling to a Brand Partner. And this hypothetical, which is drawn from information in Dr. Coughlan's -- she's one of our experts, but this is drawn from that. And it shows that a Brand Partner is motivated financially to make sales to new Preferred Customers. And it walks through the potential commissions that a Brand Partner can be -- be paid which would total -- In this hypothetical, this -- this assumes that you sign up nine new people. If you sign them up as Preferred Customers, you would make potentially the $388, plus product credit, versus if you sign them up as a Brand Partner, you would make $178.

What that shows us is that the system, the compensation system, is structured in a fashion to encourage sales to Preferred Customers as opposed to making sales to people who are part of the business opportunity.

The next slide, Your Honor, again, emphasizes that Brand Partners who build a team, an upline, if you will, that the way the compensation system is structured is structured around sales. As I mentioned earlier, if there is not a sale made, then there is no commission paid upline.

Your Honor, turning to Page 37, this is a slide that sets forth what happens if you have a new Preferred Customer who

purchases the night cream for $92, who makes money from that. And what this shows is that a Brand Partner who actually makes the sale makes substantially more than anyone in the upline. If you're in the upline, you make between 0 and $3.45 on that one sale. If you are the Brand Partner who made the sale, depending on which commissions that you are entitled to, you make a low of $18.40 and a high potentially of $48.87, plus product credit.

Your Honor, I'm happy to answer any questions on that or, with the Court's permission, I'll turn next to the claim -- the income earnings claims.

THE COURT: Okay.

MR. FLORENCE: Your Honor, first, the -- these are elements that, I'm sure, are familiar to the Court in terms of what the proof has to be. If you turn to Page 40, there's case law that we've cited. I believe both sides have cited this, and we believe that these create inherent fact-intensive inquiries.

It's the common sense net impression. You're not allowed to pull out a small snippet of a large document and ignore the rest of the document. When you have to look at the document or the video or the presentation as a whole, that's what drives what constitutes a common sense net impression. You have to prove that it's probable, not just possible; that there's a deception, and also it's not just any consumer. You have to consider who your audience is.

So there's a lot of -- there's a lot to these various

steps. And in the chart on Page 41, what we did was we broke it down in categories to try to determine: Who are the parties that are being claimed to have made the misrepresentations?

And that falls into three different entities. They talk about misrepresentations by Neora; misrepresentations by Mr. Jeff Olson, the CEO and Founder; and misrepresentations by Brand Partners. And we broke it down between representations made before February 1, 2019, and after February 1, 2019. And the reason we did that, Your Honor, is because it was at that point in time that Neora changed its name. It was previously known as "Nerium." And there was a lawsuit with one of the business owners. And as a part of that lawsuit, Neora had to change its name. It could no longer use "Nerium." So it's a -- To us, it was an effective way to do two things.

Number one, anyone who goes on the Internet now and finds something relating back to 2015, for example, that's going to reference Nerium, not Neora. If you go to Neora's website today and you look at it, you're not going to see anything relating to Nerium on it because of the lawsuit.

It's also an effective device to us because we think it's relevant that when this Court sits in equity and determines what is the proper injunctive relief, if any, to grant, it's worth looking at what happened in the past and what's -- what's happening today and to try to understand: Is this a company that is truly a bad actor? Or, as we would posit, is this a company

that always started out with good intent but over time has actually improved its processes and reduced substantially the number of complaints that are associated with this?

What this particular chart shows is that 75 percent of the representations at issue were made before 2019. Many of them can be traced to an investigation that was done by an entity by the name of TINA. It's "Truth In Advertising."

It's interesting sort of how this thing bubbled up. Neora received an award from the Direct Selling Association. And as a result of that, TINA did an investigation, and they began to look for what they believe were income representations. They eventually provided it to the FTC. And if you actually compare what TINA found with what the FTC is complaining about, and I don't want to overstate this, but a lot of them trace back to TINA. And what's interesting is that when TINA brought this to the attention of Neora, what they immediately did was they went and pulled down all those posts, contacted every single one of those Brand Partners and said, "You need to pull these down."

What that suggests, Your Honor, we respectfully submit, is that this is an organization that doesn't need to be told to do the right thing. If they see a Brand Partner who is posting something that they shouldn't, they don't argue about it. They go and do something about it.

It's -- This chart also highlights something significant as it relates to the injunctive relief that's sought

against the Founder, Mr. Jeff Olson. What it shows is that since 2011, they've identified only nine allegations that they assert against Mr. Olson and only two in three plus years since February of 2019.

THE COURT: Well, their position is that Mr. Olson is responsible for the -- at least for the 116 that are the total pre and post made by the entity.

MR. FLORENCE: Our position is, Your Honor, that ---

THE COURT: Their position.

MR. FLORENCE: Their position, yes. Their position is that. Our position is that if you look at the conduct made to Mr. Olson, particularly where you're talking about a circumstance where you're looking at conduct dating back to 2011 -- that's an extraordinarily long period of time in which to examine what has happened -- that there are relatively few that are associated with Mr. Olson individually.

THE COURT: Okay. I think my math was off.

MR. FLORENCE: That's not to suggest that they're not important.

THE COURT: Yeah, I hear you.

MR. FLORENCE: Just that it's part of what you determine -- look at, we believe, in terms of sitting in equity.

Your Honor, we broke ---

THE COURT: Just for the record, I think I said 116. It's actually 106.

MR. FLORENCE: Thank you, Your Honor.

THE COURT: All right.

MR. FLORENCE: One of the things that we break down in that chart, and I'm turning to Page 42 now, is that a substantial number of these income earning claims are attributable to Brand Partners. And when you're reading the FTC's briefs, they don't say this language, but they treat it as if Neora is strictly liable for everything done by a Brand Partner or said by a Brand Partner. In fact, they advocate two theories to bridge the gap there.

The first is the "Means and Instrumentalities," and I've cited a standard there which is the same standard cited by the FTC. We would submit that it is a fact-intensive inquiry in order to causally connect a particular instrument that was prepared by Mr. Olson, for example, or by Neora to the Brand Partner conduct which is being complained about. And we don't believe that they have tried to bridge that gap with anything specific except for a very small few instances which we address in our brief, and I'll try to talk about that a little bit later.

Also, the second theory they use is a theory that they didn't plead but which they argue is "agency." And, again, we believe there's no evidence to show that, in fact, there's agency. And agency is -- In that regard they cite the Restatement (Third) of Agency, Section 1.01, and I recited that. And maybe this has changed since I was in law school, but I was

surprised to see that when you have an agency, that that creates a fiduciary relationship.

What the FTC is asking you to do in the context of ruling that Neora is liable for anything done by a BP is to create a fiduciary relationship. And I'm going to show you lots of documentation which suggests that that's not the way it actually operates, nor is it consistent with the expectations of the Brand Partners who might be surprised to see that there's a fiduciary relationship.

In addition, they cite another provision of the Restatement as it relates to "apparent authority" which is the power, of course, to bind the legal relationship of Neora.

If you turn to the actual evidence, the very first thing you do as a Neora Brand Partner is you fill out an application. And that application -- the Application & Agreement, that's on Page 45.

And by the way, I should just note, Your Honor: We tried to cite the exhibit numbers throughout so that you'd know where -- where they were. These are all to the Motion for Partial Summary Judgment -- No.

MS. ROLLER: The Motion for Summary Judgment Response Appendix, Your Honor.

MR. FLORENCE: I wanted to make that note because there's different numbering, Your Honor.

So here you have -- The first thing an independent

Brand Partner agrees with is that they are an independent contractor and not a legal representative of Neora. The policies and procedures, again, make clear repeatedly that issue.

If you turn to Page 47, you see the provision that says that you're an independent contractor. It says affirmatively you are not an agent; that you're not authorized to bind Neora.

If you turn to Page 7.09, it's the Social Media policy, and it emphasizes that you're not to hold yourself out as Neora and that you have to represent yourself as an independent business.

So we would say from an Agency perspective, that those are -- that's evidence for the Court to consider that none of those Brand Partner statements should be attributed to Neora. Certainly, it's a fact issue.

Next, there are a variety of defenses to these. Page 49 is one of the income and product claim disclosure documents that are used -- that is used by Neora. The disclaimers have evolved over time. If you look at the way disclaimers were done in the past, I think you would see that Neora has actually improved its processes over time. We believe that's relevant in terms of whether there was a misrepresentation when a disclaimer was used, but it's also evidence of: Is this a company that needs an injunction to tell it to do the right thing? And we think the answer to that is "no."

Our Policies and Procedures, again, address income and

earning claims and leave no ambiguity about what the policies of the company are.

Turning to Page 51 and specifically referencing income claims, Brand Partners are told that you're not to make any guarantees. You're not to make any projections to prospects. No ideal projections are proper. You can't represent your income. You can't use commission checks to show people that that's how much money you make. You can't even make income or expense estimates.

Turning to Page 52, if you do violate it, the company has the right to suspend and terminate you. There's substantial evidence in the record from the Compliance Director talking about exactly how that works. Part of that process, as Ms. Davis explains in her deposition, is that they use instances where they identify something that violates the policies as an opportunity to train Brand Partners, "This is the right way to do it." In other words, substantial efforts are undertaken to make sure a Brand Partner knows what's proper and what's not.

Turning back to Page 53 again, the Social Media policy requires you to not post anything that's inconsistent with -- make any income claims whatsoever.

And finally on Page 54, the Code of Ethics for Brand Partners is they agree they will make no income representations regarding the Compensation Plan of Neora.

Your Honor, we -- we deposed the expert of the FTC in

this case regarding the Policies and Procedures, and we asked the expert, having reviewed those Policies and Procedures, "Can you identify any flaws? Is there anything in their Policies and Procedures that you think could be improved?" She was unable to identify anything that was problematic.

Your Honor, the next, the injunction factors, of course, are familiar with this Court, but they highlight that in this particular circumstance, there are multiple levels to consider in terms of whether a summary judgment is proper, including whether there's assurance of future violations or a likelihood of future violations, and we believe important probative evidence can be seen in terms of the training and compliance efforts of the company.

In fact, turning to Page 56, Your Honor, that's also been the position of the FTC. We're citing here remarks by the FTC Chairwoman, Deborah Ramirez, to the Direct Selling Association in which she says that "Multi-Level Marketing Companies should take reasonable steps to monitor and ensure that participants are not misleading about the business opportunity."

She's not taking the position that you have to be perfect. She's stating you have to take reasonable steps.

Page 57, there's the FTC's Endorsement Guidelines that speak to the same thing. Quote, "It's unrealistic to expect you to be aware of every single statement."

In the case of Neora, it currently has in the range of

34,000 current BPs, and it's not uncommon for multi-level marketing companies to have a substantial number of distributors. And the FTC Guidelines at least recognize the reality that when you're thinking about income representations, you're talking about a very large universe of potential representations, particularly as it relates to Neora when we're being judged according to all the representations made for a period since 2011.

The guidelines say you need to make a reasonable effort; that there needs to be reasonable training, monitoring and compliance programs, and we -- we believe that that is correct, and we do everything that we can, in fact, to meet those expectations, all of which would be relevant in terms of the Court's determination of whether an equity injunction relief -- injunctive relief would be appropriate.

We have gone through the Policies and Procedures Manual. We haven't talked as much about compliance efforts. We cited the *FTC versus John Beck* case for the fact that the Compliance Department in terms of income and earnings, that it is probative of whether the company should be held liable to look at the compliance efforts.

We cited the *FTC versus Nudge* decision which stands for the proposition that it be probative of whether individual liability should be imposed on Mr. Olson for what's done; that you need to look at the Compliance Department. And I've listed

here, and I'm not going to go through all of these, the various ways that are described by Ms. Davis, who's the Director of Compliance for Neora, the various ways and techniques they use to train and monitor Brand Partners in order to try to avoid these circumstances. Over time it's certainly evolved, and we believe it's certainly improved.

One of the things that's allowed for improvement was the use of a monitoring program sponsored by -- called "FieldWatch." This is a third-party company, and what they do is they go out and scroll the Internet. So if, for example, there is a term that's identified in a particular case as problematic, then you add that search term. It goes onto the Internet and it searches everywhere it can to try to find problematic posts. Does it catch all of them? I don't think it catches all of them. Sometimes certain social media you can't get access to, but it is unquestionably -- Even TINA recognizes that it is state of the art in terms of the efforts that should be undertaken by a company. And Neora not only utilizes that but also utilizes the same company, Momentum Factor, I believe is the name, to help it with its remediation efforts.

On top of that we've talked about the training program. The expert of the FTC was not familiar with any of the testimony, didn't review Ms. Davis' testimony in those efforts and was unfamiliar with what, I think, is fairly described as a vast training program and efforts taken by Neora to ensure and avoid

these kind of problems.

THE COURT: All right. Mr. Florence, I'm sensitive to the time. So I'd say in the next five minutes you should wrap up.

MR. FLORENCE: Your Honor, I will briefly just ask the Court to take into consideration some of the fact issues that we have identified on Page 60 as it relates to the various issues that come up in that regard. And with the remaining time, I want to talk about product.

Now all of the -- all of the things -- all of the argument that we've made concerning Brand Partners, agency, training, compliance, all of that applies equally to the product claims that are being made to the FTC.

And, Your Honor, just to follow along, I'm moving on to Page -- starts at Page 61.

THE COURT: Yes, that's where I am.

MR. FLORENCE: We believe that, again, that this is another very fact-intensive inquiry. And in that regard, there is a difference between being a drug. If you're a drug, you're entitled to make representations regarding whether you treat, prevent or cure Alzheimer's, Parkinson's or anything else.

If you're a dietary supplement, on the other hand, you're subject to the Dietary Supplement Health and Education Act that was passed in the Clinton administration. It's a different set of rules. And those rules allow you to make what are

categorized as general well-being and structure function claims that are described on Page 63.

Calcium builds good bones; improved energy, things like that fall within those categories.

There are different rules for a dietary supplement, and they are more liberal than a drug. And, in fact, our expert has gone through and looked at all the representations that are actually made by Neora to determine whether or not they comply with DSHEA. And she's determined that they are; that all of the ingredients that are used in the Neora EHT product have been tested on human subjects except for EHT itself.

She testified that every single representation made, that every single one of them are consistent with DSHEA and that they're backed by peer-reviewed scientific evidence. She testified -- She offered an opinion that it's not required to have randomized placebo-controlled double-blind tests for a dietary supplement. And what she does is to draw a line between claims that are actually made by Neora versus some of the things that Brand Partners may have made.

If we turn to Page 66, we broke down the claims at issue as it relates to product representations. And what you can see there is that almost all of the claims that are at issue here date back to when EHT was introduced in 2015. And there are a few in 2017, but you see in the last three-and-a-half years that there are no product misrepresentation claims being asserted

against Neora or Mr. Olson. And we believe that's because the company has improved its processes and the company has also -- that it reflects the reflectiveness of its income -- excuse me -- of its compliance and training programs.

There are a lot -- The position that seems to be taken by the FTC is that if the word "Alzheimer's" is mentioned, that, in fact, that means it's automatically an improper disease claim. And we think it's a lot more nuanced than that, and I can show you quickly.

But the next few pages, Your Honor, are actually the training guides that were prepared back when EHT was rolled out in 2015, and you'll see -- I'm not going to go through all of them -- but in every instance, they make claims that are consistent with being a supplement. And in every instance they make clear that it is not -- it is not disease -- that it's not a treat -- it's not to treat, cure or prevent disease.

There are actual FAQs that were prepared for the Brand Partners to train them that you cannot say, "EHT treats, cures, or prevents Alzheimer's, Parkinson's," any of those type of things.

Starting at Page 70 is a more current updated product guide which says the same thing.

We also, starting at Page 72 -- I'm not going to go through those -- but it highlights, again, the same Policies and Procedures. All of this evidences a serious undertaking by the

company to ensure that its Brand Partners talk about this product and to do so in a proper fashion.

I'm going to focus on one more slide. I'm mindful of the Judge -- of the Court's suggestion that I wrap this up, and I very much appreciate the time given today.

But on Page 76 is an example of one of the things that the FTC is complaining about. It's actually a press release, not by Neora; a press release by Signum, the party who discovered EHT, and it's referencing a peer-reviewed article that was published in 2017. And as the highlighted part makes clear, it makes clear that that research was conducted in rodents, not humans, and it has a link to the actual research. It has the extract which mentions rodents, mice and animals multiple times.

If you look at the posts that are being complained about, there are about 95 posts. The FTC assumes that all of them are Brand Partners. For some of them, that may be true. And the FTC complains about two of the 95 posts. I think if you look at those two posts, we would agree. We don't like the way they're phrased, and they should be taken down.

But if you look at it from the net impression, you have an article conducted -- posted by an entity that conducts research out of Princeton and describes exactly what's going on. We think that's a good example of why Neora shouldn't be held responsible for the fact that two people read this and misunderstood it.

Balanced against that is a substantial amount of evidence regarding the efforts that are undertaken by Neora to enforce its product and income rules.

Exhibit 35 talks about -- Ms. Davis talks about providing an income and product claim distribution guide to all Brand Partners when there's a problem that's discovered.

Exhibit 69 and 70 are representative examples of enforcing the enforcement policy.

Exhibit 26 is -- are the templates that are used to deal with this. So you can see how they routinely do it, and it goes on and on.

Your Honor, I have gone on long enough. I appreciate your patience. We could talk about this endlessly. I'm happy to answer any questions or to yield the floor.

THE COURT: Okay. Thank you.

I'll hear from the FTC in response.

So I'd like to -- You may respond -- They spoke much longer than you did, so you can respond as you like. I particularly want to hear from you on the issue of recruitment as opposed to sales of products, representations by BPs and whether those are attributable to the Defendants, and the injunction as it relates to EHT -- an injunction as it would relate to EHT, given the date of the representations upon which you rely.

MS. ROLLER: Thank you, Your Honor.

So I will address the issues related to the other

counts, and then I'll ask my co-counsel to come up and discuss Counts Three and Four.

So, first of all, in rebuttal, we would like to object to Defendants' unauthorized surreply brief in the form of this PowerPoint which contains numerous citations to the record and to law that are not in Defendants' briefing and that are raised here for the first time. And I'll go through those briefly and also respond to them.

Defendants' presentation began by discussing the *Amway* decision. There are a few citations to *Amway* in their briefing but not for the propositions that were discussed today.

The various *Amway* factors that they discussed, such as the 70 Percent Rule, the Retail Sales Rule, product returns, if those had been raised in Defendants' brief, the FTC would have had the opportunity to introduce to Your Honor deposition testimony from the company's Corporate Representative stating that those policies are not enforced at Neora and, indeed, that at least one of those rules has actually been removed from the company's Policies and Procedures specifically because it was not enforced.

Furthermore, Defendants argued today that only a quarter succeed at recruiting, and they say that that proves that only a quarter want to succeed at recruiting. I hope the illogic of that statement is pretty manifest. Unfortunately, the consumer complaint cited in the FTC's summary judgment brief show

that many, many people make an honest effort to succeed at Neora and fail through no fault of their own. The fact that many BPs don't succeed in recruiting even a single other BP, that is not an exonerating factor. That is an indictment.

Defendants ---

THE COURT: Well, I think -- I think what they were arguing is that they don't want to recruit others, not that they're unsuccessful at doing so, but they're not trying to do so. That's relating to this issue that I asked the question about where Preferred -- I'm simplifying this grossly; I understand that, but you'll understand the point -- that a Preferred Customer pays 20 bucks to get an additional ten percent discount and that's all they want. They don't -- They have no aspiration to create a network of recruits. They're not trying to do that. They just want the greater discount for their own consumption of products.

MS. ROLLER: Absolutely, Your Honor. I understand the Defendants' argument is that these people are not trying, but the only evidence they have for that is the proof that they are not succeeding; right?

Their evidence that people are not trying to recruit is statistics showing that people don't recruit, but that doesn't necessary follow.

And to -- I hesitate to detour, but since Your Honor mentioned the BPs who started out as PCs, there's two things that

I would say about that.

First of all, it does not follow that because someone becomes a BP from being a PC, their motivations necessarily stay the same, and Defendants have no evidence that that is true. Indeed, I want to be careful. Defendants do not have any evidence that those people's behavior stays the same.

Mr. Florence said something about midway through the presentation that indicated that that's true.

THE COURT: Yes, he said that.

MS. ROLLER: Yet, there's not -- Defendants' expert, that's not the evidence. They just have the numbers showing that those people started out as PCs and now they're BPs. What their behavior is after that is unknown. But the fact that now their purchases qualify them for rewards, including these very lucrative rewards that are promised, how could that not change their behavior?

The second thing that I would say about that population of BPs who started as PCs is that Defendants do not dispute the FTC's evidence from Defendants' own survey of Preferred Customers, which is cited in our brief, that even Preferred Customers' purchasing may not be based on legitimate retail demand. Thirty-three percent of PCs say that the product is not fairly priced. Fourteen percent of them admit that they felt obligated to sign up as PCs but have no intention of continuing. And their continued purchase behavior is strongly correlated with

the strength of their social relationship with the person from whom they're buying the product.

So I'll circle back now to a few more items that were mentioned in Defendants' presentation that were not mentioned in their briefing.

The testimony from the FTC's consultant, David Givens, also not cited in their brief and a violation of the Protective Order in this case that prohibits Defendants from asking Dr. Givens about his opinions rather than about the facts underlying the documents he provided to the testifying expert, Dr. Bosley.

The charts on Page 35 through 37, these are all new, and Defendants make no representation that these scenarios that they depict are in any way typical. And, indeed, they are not because the scenarios they're -- the Defendants expound there presume that, for example, the Brand Partner will recruit nine BPs or will enroll nine Preferred Customers when the undisputed evidence shows that the majority of Brand Partners never enroll even a single PC. So nine is really a wild assumption.

THE COURT: But I think this was -- I may have misunderstood, but I thought this was being utilized for a pretty simple purpose which was to demonstrate that there is not a financial incentive to enroll new BPs as opposed to new PCs. I thought that was the point.

MS. ROLLER: That's the purpose for which they're using

it, but that evidence does not for support that because it uses such an "out there" scenario.

To look at what the Compensation Plan actually incentivizes -- And here I'll go to Your Honor's concern about recruitment versus sales. So if you look at the recruiting rewards in the Compensation Plan, they are really hard to achieve. And that's Defendants' choice, right?

They structured that plan in that way. So, for example, the personal sales commission, which is the first of the rewards for selling, you get nothing unless you make at least $300 per month in sales which is more than most PCs buy in their entire lifetime with the company.

THE COURT: Okay. But doesn't that go to income misrepresentation and not necessarily pyramid?

MS. ROLLER: No, Your Honor. I strongly disagree with that because what makes a company a pyramid scheme is whether you can succeed by retail alone or whether you have to recruit. So this goes to the difference between a legitimate multi-level marketing company and a pyramid scheme. They're both shaped the same way; right?

And there's recruiting in both and sales in both. The question is: Can you succeed at any part of that structure?

In a legitimate multi-level marketing company, some people will recruit a lot, and they'll succeed by doing that but some people won't. The people at the bottom, they can still

succeed because you can make money by selling product alone. That's enough. Whereas in a pyramid scheme, just as in Neora, the only people who make money are the people at the top. The people at the bottom have no chance to succeed. And this is what makes a pyramid scheme illegal.

As laid out in *Koscot*, as laid out in *Torres II*, the problem with a pyramid scheme is that inherently, by virtue of its structure, the vast majority are doomed to fail. If you have to have a big downline to succeed, then most people can't succeed because for every person who has a hundred people in their downline, that's a hundred people who are failing. So whether you can make money just by selling product is extremely relevant to whether or not Neora is a pyramid scheme.

A few other points that were raised by Defendants for the first time, going to the income misrepresentations, the provisions in their Policies and Procedures, that's being raised for the first time. And the problem with the Policies and Procedures provision is that they are not enforced. And, again, if this had been raised in Defendants' briefing, the FTC would have had the opportunity to show Your Honor deposition testimony indicating that they are not enforced.

A few -- So now to turn to the issues that Your Honor wanted to hear about just real briefly on the pyramid and on earnings, and then I will turn it over to Mr. Ward.

So why is Neora responsible for BPs' statements? Four

reasons.

First, because BPs are Defendants' agents. They now argue that they are not. They now cite agency law. That's new; didn't do that in their briefs as, in fact, we pointed out in our Reply Brief. But Defendants' BPs are their salespeople. That is the whole point of having BPs. In a multi-level marketing company, you don't have employees. Your salespeople go out and sell your product by word of mouth. That is the whole point of multi-level marketing and it is the whole point of having a BP.

Second, Defendants model this behavior. If Defendants in their official videos, if Mr. Olson in his official appearances makes these claims and then BPs imitate that, Defendants are responsible for that conduct.

Third, Defendants in many cases told the BPs to make these statements. We have citations in our brief to numerous instances in which Defendants told BPs at conferences or in training videos, "Tell people how much money you make. Post pictures of your Lexus online. Tell everyone about what EHT can do for Alzheimer's and Parkinson's and CTE."

When Defendants tell BPs to make these representations, they cannot later then disclaim them.

Finally, fourth, is a legal matter. The law is very clear that an FTC Act defendant is responsible for the misrepresentations made by its salespeople, even if they made efforts, honest efforts, well calculated to prevent that. That's

from *Standard Distributors*. Even if the representations were condemned and discouraged. That's from *Goodman*.

When you use your salespeople to sell the business opportunity, to sell the products and they make positive statements about the business opportunity and about the products, Defendants should not be heard to later wash their hands of those statements.

As far as recruitment versus sales, I did discuss that a little bit previously related to the fact that you cannot make money from sales. But I also want to hit the other side of that which is that recruitment is very, very lucrative at Neora, and Defendants do not dispute that. I -- You know, Mr. Florence had a lot to say about pyramid, but one thing he didn't say: Defendants don't claim that you can make money by sales alone at Neora because they know they do not have the data to back that up.

The top five percent -- Sorry. The top five people, the top five BPs in terms of income, and this is from PX-98, made ten percent of the rewards while Defendants' own Income Disclosure Statement states that 76.3 percent of active BPs made nothing. That's just active BPs. And although Defendants argue that 96 percent of BPs who paid in more to the scheme than they got out, they got something of value. The evidence just doesn't bear that out and neither does the law.

Vemma, which is a case that Defendants themselves cite,

states that when you train BPs to purchase product to qualify for rewards, when you incentivize BPs in your Compensation Plan to purchase product to qualify for rewards, you can't unring that bell. Defendants have poisoned the well as far as figuring out what BPs' motivations are.

Defendants want to place the responsibility on the FTC to prove what percentage of BPs' motivations came from a genuine desire for the product versus a desire to qualify for rewards, but that's like dumping a cup of bleach into the well and then asking the FTC: What percentage of that water is safe to drink?

None of it. None of it is safe to drink. The well has been poisoned.

For that reason, Your Honor, Neora cannot say that BPs buy product just because they like it so much. They have trained in the videos that we presented examples of and incentivized in their Compensation Plan BPs to purchase product and, indeed, their Compensation Plan, as Defendants do not dispute, allows BPs to buy rank. For at least $2000 a month they can count toward advancement in rank.

I will now, if Your Honor is amenable, turn it over to Mr. Ward.

THE COURT: Okay. Thank you.

MS. ROLLER: Thank you.

MR. WARD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WARD: The representations about EHT and EHT products started even before the company had acquired the rights from Signum to sell this product. And so they had a big marketing push before they even began selling the product. And even -- And during that period and afterwards, the Defendants made representations themselves. So I think that it was a little bit incorrect for Defense counsel to focus so much on the Brand Partners because I think the first order of business is to look at what the -- the Defendants themselves did.

And what they did was they -- they issued a press release.

THE COURT: This is back in 2015.

MR. WARD: That's right, Your Honor, in 2015. As soon as they got the rights to sell the product, just a few days after that, they issued a press release. They had their PR firm draft it. They paid the PR firm to draft it, and it linked these -- this substance, EHT, to being something that would help prevent Alzheimer's and Parkinson's and -- and other neurological diseases and injuries. That was the press release they issued.

Then they had an event for Brain Injury Awareness Month in March of 2015 where they had ex-NFL players come and talk about concussions and how they were going to donate their brains to science.

And then in the meantime, Neora was promoting the ME Sports website that we show images of in our Complaint. They

were promoting that to build the buzz around EHT for when they began selling the product later in the spring. And the website, as we've shown in our evidence, included a page devoted to Alzheimer's disease, a page devoted to Parkinson's disease, and a page devoted to CTE.

And then at the "Get Real" event in April when they -- when they actually began selling the product, they had Max Stock get up on stage and talk about Junior Seau, an NFL player who had CTE and ended up tragically taking his own life. He suggested that this -- this product would be of special interest to football coaches and -- and -- and the -- He mentioned in that and a speech that he made at the September "Get Real" conference that it would be important to people, you know, such as were -- were shown on the Signum website who had suffered brain injury or those kind of conditions.

So -- So in other words, the Defendants were pushing this theme of Alzheimer's, Parkinson's, CTE and concussions all along. They were -- They had a blog post in -- in -- appealing to parents of -- excuse me -- children who were playing contact sports, to protect their kids by having them take EHT.

And the company also created flyers. They created flyers linking EHT to brain injuries and saying in one flyer that EHT was the solution to brain damage. And they had one of those that was directed toward soldiers who had suffered traumatic brain injury on the battlefield, and they had one that was

directed to try and sell this product to cage fighters in the Ultimate Fighting Challenge which is a league that involves a lot of contact and that the suggestion was "This pill will protect you. You can go ahead and do these things, and it's going to protect you," or it's going to ameliorate the conditions.

So these are things that the Defendants themselves did. And then they handed the baton off to their Brand Partners, and the Brand Partners ran with it, Your Honor. And they posted all over social media, all over Facebook and Instagram about how EHT -- excuse me -- was going to help prevent Alzheimer's, was going to protect you from Parkinson's, was going to protect you and your children from concussions and from CTE. And so that went on, and our -- our evidence has over a hundred examples of those posts, and that's in Exhibit 168.

Plaintiff's Exhibit 168, Your Honor, shows over a hundred representatives' examples of these posts. And the posts went on from, you know, when this started in 2015 right up until 2020. I mean they were -- they were -- There were posts showing up even while this case was pending. So this was a very big part of how this product was promoted to the public, and the Defendants made 160 million dollars as a result of that course of conduct.

THE COURT: Okay. But the chart that is at Page 66 of what was furnished in the PowerPoint, do you dispute those numbers that are contained there? That since February 1,

2019, --

MR. WARD: I'm sorry, Your Honor. What page was that?

THE COURT: 66.

MR. WARD: 66.

THE COURT: That since February 1st, 2019, there have been 16 representations about EHT, all made by Brand Partners? Whether Brand Partners or agents or not, assume they're agents. That's quite significantly down from what was happening before.

MR. WARD: Your Honor, what I would say about that is: First of all, I haven't -- I haven't seen this before, so I'm not sure about the numbers, but what they're talking about is our evidence. So we put into the record over a hundred representative examples of the posts from the Brand Partners, and they're acting as if that's -- those are the only statements made. But the truth is that the claims continued to be made after the FTC informed Neora that it was under investigation and after the FTC sued Neora.

And I would also say that some of this content is still on the Internet, Your Honor, of the EHT press release that they issued. It's still up on the Internet.

THE COURT: Well, I -- Let me. I'm just going to -- Since you raised that, I'm going to say that I think that citation in your brief at Page 25 is unfair. I looked at that because I was surprised at that and I went and looked at it. And what that means is that it is a historical document that is still

available. You can't get rid of documents from the Internet. If you're making a representation on your own website and you want to stop making it, you can stop making it, but you can't erase the Internet. And that press release is there as a historical document. I don't see that the fact that it is still present is a continuing representation. What are they to do to make it go away?

MR. WARD: I understand what you're saying, Your Honor.

THE COURT: Okay.

MR. WARD: I think, however, that the Defendants were responsible for that and other content similar to it going up on the Internet. And the -- It could be taken down. I don't know that ---

THE COURT: I don't know how you do that.

MR. WARD: I don't know that this is -- This is not a Wayback Machine, Your Honor. This content is still accessible so that if people do research, the Brand Partners for Neora and the company often tell people, "Go out and do your own research on EHT." And, of course, we've shown ---

THE COURT: Okay. But I mean if you -- I had a case involving child pornography and the jury wrote me a note requesting that as part of the relief in the case, that I withdraw this information from the Internet, and I didn't know how to do that and I don't know how anybody else can do it. You can stop making representations, but you can't erase the

historical record from the Internet.

Do you know of a way to do that?

MR. WARD: I think that there's certainly a distinction there, Your Honor, but I think if a website makes certain representations, it can be changed. And if a document on the Internet was put up by your PR firm, it could be taken down.

I think that what you're referring to, Your Honor, if I understand correctly, is that some things that are up on the Internet, there will be a record somewhere of it. It might be in a Wayback Machine.

THE COURT: Well, I hear what you're saying about the Wayback Machine. I'm just -- I'm not familiar with how a press release that is issued on Day A is gone on Day B because you want it to be. I just don't know how to do that. Well, I don't want to waste time on this.

MR. WARD: You're quite right, Your Honor. I mean that is -- that is one of the points that their PR firm ---

THE COURT: Well, the issue -- Look, the issue with respect to EHT is, in my view, two-fold. First of all, are the Defendants responsible for what the BPs are saying? And (2) are they continuing to say it?

If the last representation about EHT was made three or four years ago, you're going -- and I agree and I find that the Defendants are responsible for whatever misrepresentations were made about it, if you convince me that they're saying that a

person won't get CTE or Alzheimer's if they take EHT, you're likely to win on that being an actionable misrepresentation, if it's made by someone whose statements are attributable to the Defendants. But if the last time anybody said that was three or four years ago, you're going to have to convince me that there's a reasonable risk to the public that such a statement will be made the day after our case is over, if I don't enjoin them.

MR. WARD: Yes, Your Honor. Under the *Cornerstone Wealth* factors, you're absolutely right.

THE COURT: And I don't -- I don't hear the Defense attempting to defend the merits of these representations about what EHT can do. Mr. Florence wants me to put this in the category of "Eat your Wheaties and you won't get a cold."

He knows, you know, and I know that if there are misrepresentations that EHT will prevent people from getting CTE, that's going to be actionable if it's made by a person whose misrepresentations are attributable to them, and then the only issue is going to be how recently and by whom were such statements made so I decide whether to grant injunctive relief.

You've don't have to do much to convince me that statements like that are false.

MR. WARD: Absolutely, Your Honor. And that's why we do believe that the liability is clear because these statements were made both by the Defendants in setting the stage and building -- building these up as the themes to sell EHT to the

public, and then the Brand Partners took it from there and spread it on social media.

And I would say he did mention one thing that I just wanted to clarify. It sounds like Your Honor understood this, but he said that their expert looked at all the claims, and we dispute that. Their expert definitely did not look at all the claims. Their expert looked at the claims that were on a certain piece of paper that was printed up by the company that had some of those FDA type of claims on it, some of the more generalized claims about well-being.

But the claims that we're talking about, there's ample evidence in the record that they were made, and they were made very intentionally. I mean to say in a flyer that EHT is the solution to brain damage, that's a totally uncorroborated claim, Your Honor. There's no substantiation at all for that. Our experts have attested to it. Defendants' expert doesn't have anything to say about that. Defendants' expert refused to express an opinion on whether or not those type of claims about Alzheimer's, Parkinson's, concussions and CTE could be substantiated. She said nothing about that. She only wanted to talk about the other claims, but those claims are, you know, whether or not they're subject to FDA rules. They're not the claims at issue in this lawsuit.

And so that's why we brought our *Daubert* motion against their expert because she doesn't offer any relevant testimony on

the claims at issue, and she's not qualified to express an opinion about marketing or advertisement, particularly since she didn't review the evidence showing that the claims had been made.

And I would say that, Your Honor, also the exhibit showing the posts about the rodent study, I think Defendants are misdirecting the -- the issue on that. The -- What that shows is that they didn't have substantiation. And, of course, they knew that from the outset.

When they got the rights from Signum to distribute EHT, Signum gave them all the research. They knew there were no human trials. They knew they didn't have substantiation. They worried about it. They exchanged e-mails about it. And this rodent study that came out, that -- that's just, again, something that doesn't substantiate these type of claims.

Their Brand Partners, there's a couple of them that posted in response to that and made claims that they admit crossed the line, but there are numerous other examples in the records, Your Honor, that you can look at and see the kind of claims that their Brand Partners were making. And those claims utterly lack substantiation, and they were very material because they go to, you know, very frightening diseases that we're all concerned about and we all wish there was a cure. But it's simply not fair to make a 160 million dollars telling people that you've got the answer when you know you don't.

THE COURT: Okay. All right. Thank you.

MR. WARD: Thank you, Your Honor.

THE COURT: All right. Mr. Florence, I know you'd like to have a rebuttal but you spoke about three times as long as they did, so I'm not giving you one.

MR. FLORENCE: Thank you, Your Honor.

THE COURT: All right. I know it would be brilliant, Mr. Florence.

MR. FLORENCE: It would be eloquent.

THE COURT: All right. I'm denying all Motions for Summary Judgment. The Court will consider these matters upon a full evidentiary record where the Court can hear the testimony, observe the persuasiveness of the witnesses, and make an informed judgment based upon all the evidence. So all Motions for Summary Judgment are denied without prejudice. That moots the objections and motions to strike evidence that was submitted.

Now I want to talk about the *Daubert* motions. I -- First, I want to talk about the motions to strike the submissions by the FTC of declarations. These were submitted, obviously, in connection with the Motion for Summary Judgment. I'm assuming, now that I've denied the Motions for Summary Judgment, that the witnesses would be appearing, including Ms. Miles and Ms. -- Is it "Boggess" or "Boggess"?

MS. ROLLER: Your Honor, it is Ms. Boggess. And because of professional obligations, Ms. Boggess will not be available to testify.

THE COURT: Okay. So the issue of her declaration is moot.

Ms. Miles, I assume, will be testifying as a numbers cruncher, according to the FTC.

MS. ROLLER: That is correct, Your Honor.

THE COURT: All right. I take it from the briefing on this that the Defense position is that Ms. Miles did not crunch the numbers properly. Is that right?

MS. KU: Your Honor, our position is not just that she did not crunch them properly but that she does not qualify as a 1006 witness either for various reasons.

THE COURT: Why?

MS. KU: For one, in order to qualify as a 1006 witness, you have to be able to show that you provided the underlying documents. In this case, they say that the documents are, in fact, our own data. But the problem is that our own data is being manipulated and utilized in a way to generate their calculations; that we don't know how that was done.

THE COURT: Okay. You can take her deposition. I'm going to permit you to do that. Otherwise, your motion to strike her is denied. So if you want to take her deposition of how she manipulated the numbers, -- I'm not using "manipulated" in a pejorative -- then you can.

And the FTC is directed to arrange for that.

My strong inclination with respect to all the other

motions to strike, Coughlan, Vandaele and Kurzer, is to deny all of those. Let the Court hear the evidence and objections in connection with the testimony, and I'll either hear it at trial or I won't. The chances are I'll hear it. And then if I conclude it's not appropriate for the Court to consider it or I don't find it persuasive, then that will be the way I will determine it.

I'll hear any comments on that. Otherwise, that will be my ruling. Anybody want to be heard on that?

Okay. All right. Now let's spend a few minutes talking about the trial. I had to make one adjustment in the schedule that I had provided to you all that I assume you have now received.

Does anyone have any issues with respect to planning for and proceeding with the trial on the schedule the Court has provided?

MR. FLORENCE: Your Honor, we do not. I do want to make a comment that we were doing a little bit of back-channeling research regarding whether an opinion that was reversed ---

MS. KU: I'll go -- I'll go ahead, Your Honor. I just wanted to say earlier you had mentioned that there was a parallel rule to the one in the Ninth Circuit --

THE COURT: Right.

MS. KU: -- in the Fifth Circuit and, indeed, there is. It's 41.3 that does affect the precedential value of a panel

decision that's been vacated by an en banc court.

In our position, we would say that the relevance of the citation is not diminished in the sense that we're saying that that does -- has been stated to be the case. There are other Fifth Circuit cases that we could point to that actually do go ahead and cite to similar cases that have been situated in that regard.

For example, in *U.S. v. Brown*, the citation is 167 F3d 538, Footnote 1. There they just -- they cite to a case that has had a panel -- that's a panel decision that was vacated by an en banc court, and then they give the subsequent history. The point being that our position here is not that that has precedential value so much as to control this Court but that it goes to inform the Fifth Circuit law that has existed and has formed what we should consider to be relevant here.

THE COURT: Okay.

MS. KU: We will say that the *Torres II* holdings are largely relied on by us in this -- in our brief.

THE COURT: Okay. All right. No problem. I wasn't finding fault with you in citing it. I am more familiar with this than I would be otherwise because for all the times I've sat with the Ninth Circuit, which is many over almost 15 years, I was on a panel where I was the dissenter. The only time I've ever been a dissenter and the case went en banc and my opinion, which I thought was pretty darn good, which is the same way the Court

came out, was all for naught.

All right. Any -- Any other matters with respect to the trial?

MS. ROLLER: Your Honor, we had two sort of logistical questions.

THE COURT: Okay.

MS. ROLLER: First, is Your Honor interested in hearing opening and closing or would you prefer to dispense with that?

THE COURT: So I'm going to let you use your time as you would like. I hope it's obvious that I am not ignorant of what the case is about. So you may -- If you think it's helpful and productive, you may open and choose not to. That will be fine. I don't have a strong preference.

MS. ROLLER: Thank you, Your Honor.

Our second question is about Your Honor's openness to remote testimony. We have a couple of witnesses, one of whom is on the older side and would prefer not to travel, and the other of whom may not be able to physically be present. This is Tator and Mastrianni. I don't know how Defendants would feel about that but just in general, taking Your Honor's temperature on the possibility of remoteness.

THE COURT: Yeah. I don't -- I don't have a strong view about not doing that. I have done that on occasion. I would -- If there's a strong objection that I find compelling that there's some reason to believe that Cross Examination, for

example, cannot be fruitful or productive that way or there's a concern that the witness might be coached because of the circumstances, I allowed it and disallowed it. It all depends on the circumstances, but I'm not structurally opposed to it, if it's in such a way that I can see and hear and we've got a good wireless connection. I mean I would be in favor of that, affirmatively in favor of that, more than I would be in a jury trial because I'm used to seeing people testify remotely, and I don't have a problem with it.

So I think you should assume that there should be a presumption in favor of doing so. And if the opponent has a strong reason other than just generally not liking it, you can say so. And I will take seriously an argument that, "This is a very important witness and we cannot effectively cross-examine them unless they're here live," but don't throw that argument around as to just anybody.

MR. FLORENCE: Your Honor, as it relates to these two particular witnesses, we would certainly not have an objection to accommodating them. There are other witnesses where our position may be different.

THE COURT: Yeah, that's fine. I would anticipate that would be true as well, and I assume you all will be accommodating of each other in that respect.

But, please, do a check. You know, people think it's all working fine and then we cue it up and I can't hear and I

can't see.

And I've said this for 22 years: This courtroom is haunted. Before we got new technology, when I was a lawyer sitting right where you are, Mr. Florence, all of my at that time primitive technology all went south. And I looked up at Judge Maloney, who's sitting -- who was sitting where I am sitting right now, and he said -- put his glasses down at the end of his nose and said, "Move along!"

So every time something goes wrong in here, I remember that and never say, "Move along." But there's something wrong in here that surfaces when no one could predict it. So just make sure if you're relying on technology, that you check it out before I come out here and we waste our time.

Kate, do you want to be the timekeeper or do you want them to keep their own time?

LAW CLERK KATE MARCOM: I can keep it.

THE COURT: Okay. Okay. So you all can keep your own time as well, but Kate's going to be the official timekeeper for the Court.

MR. FLORENCE: Your Honor, we have one matter that we anticipate needing to address with the Court --

THE COURT: Okay.

MR. FLORENCE: -- at some point and that is the propriety of protecting the confidential business information of Neora. We are mindful of what the Court recently said regarding

sealing of records. We do have a young attorney, that that -- we think that that would be an opportunity for that young attorney to make an argument that we think is important.

THE COURT: Well, I don't want to waste time during the trial. I'm going to give you during the trial, without further proof, the opportunity to claim that something is confidential. I'll hear if that is disputed. If it's disputed, I will determine it later. Even if it's not disputed, you all need to know that every time I go to a judge conference where there are appellate judges of all kinds there, this is the No. 1 subject on which we get fingers wagged at us because when cases go up on appeal, they can't do their jobs because they can't get access to the stuff they need to review to review the record, and that's the fact.

And so I don't have the time or ability to review every designation of confidentiality for substance, but things that are old are not going to be treated as confidential. So you all need to be sparing in your designations. You need to figure out what is really confidential, and then you've got to come up with some methodology so the Court of Appeals can do its job.

MR. FLORENCE: Thank you, Your Honor.

MS. KU: Your Honor, if I may ask --

THE COURT: Yes.

MS. KU: -- a housekeeping matter. With respect to the deposition of Ms. Miles, would it be all right for us to request

the documentation that we believe is necessary in order to take that deposition and that that be provided to us within a reasonable time before so that we can prepare sufficiently?

THE COURT: Well, I think you should tell them what you want and they will answer. I suspect the answer is going to be, "You already have it; it's your own materials, and there isn't anything else for us to give you." That's what I expect this dispute to be about. And then when somebody comes to the Court on a motion, I will be referring it to the Magistrate Judge.

MS. KU: And lastly, with regard to objections that are raised, how is that counted in terms of the time per party?

THE COURT: So if you're talking, your clock is running.

MS. KU: Thank you, Your Honor.

THE COURT: That's a good way to keep objections down to a minimum. If the other side's clock is running, that is going to maximize the number of objections. So if you're talking, your clock is running.

Now if that is abused, if there is reason for me to adjust it, you can ask me to adjust it, but the presumption will be that if you're talking, your clock is running.

Anything else?

Okay. You all can have water. If you -- If you all want to be eating lunch in the courthouse during the break, one side can use the Jury Room and I'll find another place for --

Usually it's this side that's closer that uses the Jury Room.

Do you all want me to find you a space?

MR. FLORENCE: That would be terrific.

THE COURT: Okay. But -- This is off the record.

(An off-the-record discussion was held between the Court and counsel.)

THE COURT: All right. Anything else?

Okay. So I'm going to give you all a little bit of extra information about me in a bench trial. I haven't had one in quite a while.

In a jury trial, I rarely ask questions and keep myself out of the way of the lawyers. In a bench trial, I often ask questions. So you should not be surprised at that. And that's the exception to: If I'm talking, my clock is not running. Your clock is running. I will be making -- As a general proposition, I don't think that is going to unduly affect your time, but I'll ask Kate to keep track of my clock separately. I'll allocate it as I deem appropriate. But if it is unduly taxing one side or the other, I'll take care of that.

Now we have to finish when I said we would. So it is conceivable that we may have to run longer on a certain day if, for whatever reason, we don't look like we're making progress with the hours that I have assumed. I put enough fudge in there for us, I think, to finish as scheduled. But if something is up, then I may have to have you work longer or earlier than I

anticipated.

MR. FLORENCE: Does the Court anticipate post-trial briefing?

THE COURT: I don't know. Maybe. Probably.

MR. FLORENCE: We had proposed 25 pages. I think we both agreed that we spilled a lot of ink in this case already.

THE COURT: Yes, you have. And I would rather tell you what I want than have you tell me what you think I want. So I'll tell you what I want, what I want briefing on, and how much briefing I want. There are a lot of dead trees in this case.

MS. KU: Your Honor?

THE COURT: Yes.

MS. KU: May we have two more logistical questions?

THE COURT: Sure.

MS. KU: With regard to depo designations, would you prefer that we read them into the record or that they be tendered to you in just a document?

THE COURT: That's -- That's a fair question. If -- If you all would like me to be reading in off hours, I'll do that. I mean that might -- If that's what you meant. Do you -- Do you mean -- Well, I'll explain what I mean, Ms. Ku.

So let's say you have the deposition of the head of Marketing of Neora, and there are a hundred pages of deposition testimony of both of you and you marked the transcript with objections, if you have objections. I can either have you read

that or I can take that home and read it in the evening, and I will put in the record my ruling on the objections.

So I can commit to doing that, if it's not where I'm committing to reading a thousand pages every night. I won't be able to do that. But if it's in the range of 100 pages or less, I can do that.

MS. KU: Thank you.

THE COURT: So I can read it myself or the other option is for you just to give it to me and have me read it right here because I can read faster than you can have someone read it. I don't really see the point -- No. It's -- It's -- You know, a Shakespearian actor reading this is not going to be more convincing than me reading it myself. That sometimes works for the jury but that's not going to work with me. So it's most efficient for me to read either while I'm sitting up here during your allocated time or, as I said, with the limitation of a hundred pages or less, I can read it in the evening, as you like.

MS. KU: Okay. And then with regard to exhibits, you have in your Scheduling Order reference to gum labels, and I know that the FTC had asked us about using electronic labels. And maybe there is a possibility for us to use those as opposed to the ones that you actually stick on there. I don't know if the FTC is still interested in that, but I thought I would just mention it.

THE COURT: I don't know -- I really don't know about

the situation as it relates to a record going up on appeal. If all the exhibits have come in electronically, that's probably fine. That's up to you to confirm that. But if you want to mark your -- If that's fine and if you want to mark your exhibits electronically only and have me looking at them only on the computer and you provide them in a way that doesn't take my law clerk an undue amount of time to put them on the computer, like on a flash drive, that's fine. So that's up to you all. You work that out. I can look at them that way. I mean I'll have an extra computer up here to do that.

MS. KU: Understood, Your Honor. Thank you.

THE COURT: Okay. All right. Any other questions?

Okay. Off the record.

(An off-the-record discussion was held between the Court and counsel.)

MS. ROLLER: Your Honor, if I may clarify.

THE COURT: Sure.

MS. ROLLER: Will Your Honor be back in time for the Pretrial Conference on the 11th?

THE COURT: That, I think, has already been rescheduled because the answer is "no." The answer is: No, I will not. So that isn't going to happen.

What kinds of things would I need to rule on at a Pretrial Conference in a bench trial?

MS. ROLLER: Your Honor, the parties have exchanged

exhibit objections per the Court's Scheduling Order, deposition designations and objections, and there may be motions *in limine* as well.

THE COURT: Okay. Well, I'm just going to give you this piece of advice: It sounds odd to a jury when I have discussed with them after a trial what a motion *in limine* is but it sounds really odd to me when I discuss a motion *in limine* with me where I listen to what I'm not supposed to know and then decide if I should know it. That's a bizarre concept which I think is silly. So I'm not granting any of those. You should object that I should not consider it, but it makes no sense for me to hear that in advance and spend my time on that with one exception: If there is -- And I'll use an example that has come up in connection with the *Daubert* issues.

If there is a survey that you claim should not be considered and you want me to rule on that in advance, that's an example of something that makes sense for me to rule on in advance because, otherwise, you all are going to allocate your time improperly because you won't know what's coming in. So that's an example of that. The problem is: I don't have any time to give you for that before we start unless somehow you want to talk about some of that right now, without being prepared.

MS. ROLLER: If Your Honor would be open to it, we would renew as a -- as a motion *in limine* our -- the section of our Daubert motion and a section of our summary judgment response

that seeks to exclude the LRW survey.

THE COURT: Okay.

MR. FLORENCE: Your Honor, we would ask that we take this up because there are two surveys. They are sponsoring evidence through a 2015 draft survey that we object to and, likewise, they object to our 2022. I propose and suggest that we take it up at the outset of the -- at the outset of the hearing.

THE COURT: Of the trial.

MR. FLORENCE: Of the trial. Excuse me.

THE COURT: Well, I -- I don't see how we can do it in the next six minutes. And I'm -- I'm really not sure why you thought -- And this may be on us. I'm not suggesting it's on you. I don't know if we just slipped up and didn't tell you that Pretrial was not going to happen, but it's not going to happen, and I don't have any days before the trial starts for me to give you to rule on that. So I think we're just going to have to take it up.

Now you're at -- you're at some risk that I may exclude something that you're bringing a witness for and vice versa. So you better be prepared both ways. If there are things like that that you want to take up at the beginning, we can, but I would prefer to take it up in -- in context.

MR. FLORENCE: Sure.

THE COURT: And if you say to me, "Look, Judge, I need an extra half hour because I've got to -- given a ruling that I

didn't anticipate, because of this issue which you didn't take up in advance," I'll listen to you. I'm not making a commitment, but I'll listen to you.

MR. FLORENCE: Okay. Thank you, Your Honor.

MS. ROLLER: Thank you, Your Honor.

THE COURT: Okay. All right. Okay. Kate will be out. So if you have questions about court procedure, the best person to contact is my Courtroom Deputy, Alicyn Anthony, because my other law clerk is brand new and hasn't had a trial yet. So I would suggest that you call Alicyn if you have any other questions. If there is really an emergency that needs someone's attention, call Alicyn and she can get the duty judge or I'm giving you permission to contact the Magistrate Judge in my absence. And I'll let the Magistrate Judge know that in an emergency where I can't be reached, that the Magistrate Judge can be contacted by you directly. Okay?

All right. Anything else?

Okay. Thank you. All right. You all may be excused. Thanks so much.

MS. ROLLER: Thank you, Your Honor.

MR. FLORENCE: Thank you, Your Honor.

MS. KU: Thank you, Your Honor.

MR. WARD: Thank you, Your Honor.

(Hearing adjourned at 3:25 PM.)

CERTIFICATE OF OFFICIAL REPORTER

I, Deborah A. Kriegshauser, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of Texas, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 30th day of September, 2022.

/s/ Deborah A. Kriegshauser
_____
DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER